[illegible] the United States

[illegible] TERM, 197[illegible]

No. 323

EDWARD H. COOLIDGE, JR.,

Petitioner,

v.

THE STATE OF NEW HAMPSHIRE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

REPLY BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

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In our opening brief we showed that the microscopic particles taken from petitioner's Pontiac automobile for use as evidence of guilt were obtained by an unconstitutional search and seizure because the warrant under which the search was conducted was issued by the Attorney General while in active charge of the investigation and subsequent prosecution instead of by detached and neutral magistrate as required by the Fourth and Fourteenth Amendments. The constitutionality of such a warrant was the issue litigated below and decided—wrongly, in our submission—by the New Hampshire courts.

In this Court the State has now offered a grab bag of contentions to justify the search for evidence in the auto-

mobile even if there was no validity to the warrant under which the search was actually made (Br. pp. 26-35). The Manchester police acted under the warrant. They never faced the question whether there was an exigency that gave probable cause for a search in the absence of a warrant; or, if they did face the question, they must have decided there was no exigency for they took time to seek the warrant. The New Hampshire courts have never inquired into whether there was factual justification for a search without warrant. The State's present, belated contentions ought not to be open here.

Even if open, the State's new theories are without merit.

1. The contention that the seizure of the Pontiac automobile was incident to the arrest of petitioner (Br. 26-27) is unsupportable because petitioner had been arrested and gaoled an hour and a half or two hours before the seizure occurred (App. 77-78, 256-257). In *Preston v. United States*, 376 U.S. 364, 366, 367, the Court unanimously held—

> Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest.

No distinction can be made in this regard between a warrantless search and a warrantless seizure. The rule stated in *Preston* has been consistently affirmed. *Cooper v. California*, 386 U.S. 58, 59; *Dyke v. Taylor Implement Co.*, 391 U.S. 216, 220; *Chambers v. Maroney*, 399 U.S. 42, 47.

2. *Chambers v. Maroney*, 399 U.S. 42, holds only that when law enforcement officers have probable cause to stop a motor vehicle on the highway shortly after a crime, to arrest the occupants and to search the vehicle, then they may constitutionally postpone the search until the suspects have been detained in the police station and the car taken to a safer place. The relevant conditions on the privilege are not satisfied in the present case. Here, in contradistinction to *Chambers*, the vehicle was not moving on the highway but in the owner's driveway; it was not, by any

stretch of the imagination, being used to commit or flee from a crime; petitioner was not arrested in or near the car; and an immediate search for evidence in the car on petitioner's premises would have been just as unconstitutional as the search actually made two days after the car had been seized.

The most important of these distinctions, we submit, is that the present case does not fit under the exception from the usual requirement of a search warrant established by the line of authorities stemming from *Carroll v. United States*, 267 U.S. 132. It is one thing to stop the driver of a vehicle in a public place upon probable cause to believe that it then was being used by the driver in a criminal enterprize. It is quite another to go to his home to make a general search of his car in his absence, even when possessed of probable cause. *Carroll* held only that where there is probable cause to believe that a car travelling on the highway is being used to transport contraband, law enforcement officers may stop the vehicle and conduct a search without obtaining a search warrant. The reason for the exception to the general rule requiring a search warrant is plain enough. A moving vehicle will have passed on before a warrant can be obtained. The very fact that vehicle is travelling on the highway in a probably unlawful journey or in flight is itself an exigency demonstrating the impracticability of securing a magistrate's order. No such exigency exists when the police are concerned with the contents of an automobile lawfully parked beside the owner's house in his own driveway with not the slightest reason to believe that the vehicle will be removed.

Later cases adhere to this rationale. In *Brinegar v. United States*, 338 U.S. 160, 164, the Court said–

> The *Carroll* decision held that, under the Fourth Amendment, a valid search of a vehicle *moving on a public highway* may be had without a warrant, but only if probable cause for the search exists. [Emphasis added.]

The underlying reasoning was summarized in last Term's decision in *Chambers v. Maroney*, 399 U.S. 42, 51–

> *Carroll, supra,* holds a search warrant unnecessary where there is probable cause to search an automobile *stopped on the highway;* the car is movable, the occupants are alerted, and the car's contents may never be found if a warrant must be obtained. Hence an immediate search is constitutionally permissible. [Emphasis supplied.]

In *Chambers* the automobile was a "fleeting target" being used, as the police had probable cause to believe, to carry the armed robbers, their loot and their weapons from the scene of a crime.

We are not concerned in the present case with the two day delay in searching petitioner's Pontiac after it was seized. Here, in contradistinction to *Chambers*, the police could not have constitutionally searched the Pontiac without a warrant in the beginning. To extend *Carroll* and *Chambers* to every search for evidence in an automobile, even when parked in the owner's absence in his driveway or garage, would dangerously impair the present rule requiring law enforcement officials to obtain a detached and neutral judgment on the question of probable cause unless they can demonstrate special need for exemption. *Chimel v. California*, 395 U.S. 752, 762; *Katz v. United States*, 389 U.S. 347, 356-358; *Warden v. Hayden*, 387 U.S. 294, 299. When a car is resting on the owner's property, there is no sound basis for distinguishing a search for evidence among its contents from a search for evidence in an office, tool shed or garage. The owner has as much reason to expect privacy for the content of one as for the other. The car may be moved more easily than the building, but it is scarcely easier to move evidence already in an automobile than it is to take damaging evidence in the office, tool shed or garage and carry it away in the owner's car. Surely this Court is not about to hold that a warrant is not required to search for evidence that can easily be carried in an available car.

3. The State also contends (Br. p. 28) that since petitioner's automobile was visible from the highway, the police could constitutionally seize it; and that the police having thus impounded the automobile were authorized to search it at any time while it was in their custody. There are three short answers.

(a) The cases permitting seizure of contraband in plain view of the police[1] do not extend to entering private property for the purpose of searching out without a valid warrant the unknown contents of a large and visible container like an automobile. Indeed, no decision of this Court reaches even close to the seizure of an article for purposes of inspection merely because it happens to be visible from a public way.

(b) The Manchester police were concerned with the contents of the automobile, not with the vehicle itself. The search and seizure were conducted under the invalid warrant. The warrant (App. 146-147, 149) described the car as the locus of articles for which the police were to search, viz–

> certain objects and things used in the Commission of said offense, now kept, and concealed in or upon a certain vehicle, to wit: 1951 Pontiac two-door sedan, Green, N.H. Regis. No. IG 719, Serial No. F 605270 3, to wit: objects described on attached list and that the same may be removed before night-day.

The automobile was not listed. The return (App. 152-153) also made it plain that the police were looking only for things in the car, viz–

> INVENTORY
>
> Vacuum sweepings from floor mats, seat cushions, an[d] trunk mats

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[1] E.g., Hester v. United States, 265 U.S. 57; United States v. Lee, 274 U.S. 559; Ker v. California, 374 U.S. 23, 42-43.

Carborundum honing stone with reddish stains, boxed

Yellow towel, stained

(c) The evidence taken from the car and introduced at the trial was microscopic particles obtained with a vacuum cleaner. The police were conducting a general and highly intensive search for evidence. They had no knowledge of what they wanted, except possible evidence of guilt. There is no resemblance between this kind of systematic combing of a vehicle for what may turn up and the casual discovery in *Harris v. United States*, 390 U.S. 234, of a visible card while rolling up a window for the protection of the vehicle itself.

The Manchester police set out to search petitioner's Pontiac for evidence described in the warrant issued by the Attorney General (App. 141-144). They found none of the articles specifically described (Compare App. 142 with App. 145) but conducted a general search with a vacuum cleaner in hope of obtaining some kind of evidence. If the warrant was invalid, the general search inside the Pontiac cannot be sustained by pointing out that it was visible from the street any more successfully than the State could uphold the search of a building on the ground that it was visible to the public. The unauthorized invasion of a private place by law enforcement officers cannot be excused merely by

saying that they could see the outside and had probable cause to believe that it had been used in the commission of a crime.

Respectfully submitted,

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